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Relationships v Relatedness in family Justice

Judith Masson*

Law School, University of Bristol, UK

The Court of Appeal's decision in *Re W* corrects misunderstandings that there are rights or presumptions which govern court decisions about children and criticises the simplistic application of the Supreme Court's decision in *Re B* (2013). It raises important questions about: the meaning of welfare and the continued relevance of *status quo* in decision-making; how ECHR art 8 should shape litigation in private family law; delay in adoption proceedings; how errors in the system are created, detected and avoided; and the role of the court in promoting agreements.

Key words: adoption; special guardianship; attachment theory; rights to family life; delay.

In *Re W* [2016] EWCA Civ 793, the Court of Appeal allowed an appeal by prospective adopters (Mr and Mrs X) against a decision by Bodey J, refusing their adoption application and granting a special guardianship order (SGO) to grandparents, who had never met the two year old child, A. Readers with understanding of attachment theory and knowledge of the effects of breaking attachments will be alarmed at the original decision. Those steeped in the principles of the Children Act 1989, which is drafted to restrict interference in families by court applications may wonder how the lower court got into this position. However, anyone who has followed the development of case law will be aware that thinking and practice in the family justice system has been re-oriented since the decisions of *Re B* [2013] UKSC 33 and *Re B-S* [2013] EWCA Civ 1146.

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Lord Justice McFarlane, who gave the main judgment with which Jackson and Lindblom LJ agreed, found Bodey J's decision 'fatally flawed' (para 63) because he had accepted and relied on 'inadequate' evidence from the children's guardian and Independent Social Worker (ISW) which was based on a misunderstanding of the law. He also criticised the judge's failure to recognise the relevance of human rights (para 77) and the way the case had been conducted, which left the court with no knowledge of A as a person. The case was remitted for rehearing by Cobb J, with a clear indication that advocates should present human rights arguments. Lord Justice Jackson expressed a hope that the parties would compromise (para 95).

In private law decisions, the established arrangements for the child, referred to as the '*status quo*', have long held magnetic importance, revealed in empirical research (Eekelaar and Clive 1977) and justified in case law (*D v M (Minor: Custody Appeal)* [1982] 3 All ER 897). McFarlane LJ discussed the *status quo* argument, repeating passages from his leading judgment in *Re M' P-P* [2015] EWCA Civ 584, where the Court of Appeal overturned a decision to remove children from their long-term foster carer/ prospective adoptive parent and grant a SGO to their aunt. He noted that it was not usually relevant in public law cases but was reflected in the welfare checklists, in Children Act 1989, s.1(3)(c), the effect of change, and Adoption of Children Act 2002, s.1(4)(f), the likelihood and value

*Email: Judith.Masson@bristol.ac.uk

of continuing relationships. In this way attachment theory, the importance of children's attachment to their primary carers for development and well-being was firmly accepted and acknowledged in law.

While it is true that shorter care proceedings mean fewer children are in long-established placements at the final hearing, this is not the case for adoption proceedings. One effect of *Re B-S* has been to lower the bar for leave to oppose adoption. Munby P stated correctly that 'mere passage of time cannot be determinative' (para 74 (vii)). However, where the ultimate question is whether the child should live with the adopters or someone else, the length and depth of attachments can be decisive. Also, applications for leave like that of the grandparents will necessarily involve consideration of disruption to the child's attachments, (CA 1989,s.10(9)(c)) and about the likely success of the substantive application. From this perspective, granting leave to the grandparents was questionable.

McFarlane LJ drew a distinction with fostering because 'a firm and secure attachment is not one of the primary aims of the placement' (para 64). This is too simplistic. Good fostering practice stresses the importance of 'a secure base' for children (Schofield and Beek 2014) and long-term fostering is a permanency option (DfE 2015, 2.4). Some carers cannot afford to become special guardians or adopters. The nature of the care arrangement matters, not its label. There was an invaluable relationship between the carer and the children in *Re M'P-P* long before she was approved to adopt either of them.

Both the children's guardian and the ISW worked from the assumption that if a relative was willing and able to care for a child, the child had *a right* to be placed with them. Their thinking infected Bodey J's decision. McFarlane LJ was determined to put an end to such views. There was no right to or presumption/ assumption of placement in the 'natural family' (paras 70-71). The pro and cons of each option must be assessed in terms of the child's welfare. Baroness Hale's phrase, 'nothing else will do' (*Re B*, para 215) was 'meaningless, and potentially dangerous' (para 68) not a 'hyperlink' to the outcome without such assessment. It provided a distillation of the proportionality and necessity tests, and should only be deployed after the balancing exercise.

Counsel for the adopters prepared a written submission: 'to allow an application to prevent an adoption where a child has spent sufficient time with her adoptive family that she views them as her only and permanent family is contrary to public policy and in breach of the human rights of the child and the adoptive parents' but accepted the court's suggestion not to proceed orally with this 'adventurous' approach (paras 61-2). Nevertheless, McFarlane LJ's judgment included some discussion of it. His style was elliptical as if he did not want to nail his colours to the mast but recognised its strength. He appeared to accept that allowing applications in such circumstances could be a breach of public policy /human rights (para 64) but was not prepared to hold the Children Act 1989 incompatible with the Convention. However, he found 'beyond question' that 'family life' now existed between A and the Xs and must be respected and, more tentatively, that these were the only article 8 rights in play (paras 79-80) but left further analysis and the implications to Cobb J.

Where the only art 8 rights in question are held by the prospective adoptive family, the court's leave for others to seek orders, which could undermine those rights is an interference in family life, which can only be justified within article 8(2). This is reflected in the leave provisions in Children Act 1989, s.10. Parents, step-parents and (long-term) carers do not need leave because they have 'family life' with the child, others must qualify under s.10(9). Unless the intervention, leave for private law proceedings, is proportionate the family's human rights are breached. On this analysis, the court should not have allowed the grandparents to make their SGO application.

The Xs' adoption application should have been unproblematic even though three months after it was filed, and in response to the standard notification letter, the father indicated an intention to oppose, as did the grandparents. The father could not have shown change of circumstances (ACA 2002, s.47(7)), he was involved in care proceedings relating to his second child. The grandparents had no right to oppose (para 9); they needed leave to apply for a SGO (ACA 2002, s. 29(5)) and had to give notice to the local authority three months beforehand (CA 1989, s. 14(7)). Rather than determine the Xs' application, the court managed the process to facilitate the grandparent's challenge; whether this was deliberate, due to a shortage of hearing time or because adoption applications are not given priority was not explained. The consequences for the Xs, A and the grandparents has been a year of stressful litigation, which is not yet over, mostly at public expense; the hard-pressed court system has used up resources needed for other cases. This is a clear example of delay creating work and causing injustice. Adoption proceedings should be time-tabled to be completed in 20 weeks.

The decision-making at first instance was riddled with errors: The grandparents were treated as if they could apply to oppose the adoption; the potential harm to A by their application for leave was evidently not considered. The children's guardian prepared a report as if the court was only considering an uncontested CAO application, and without meeting the adopters or the child. The ISW instructed for the special guardian assessment founded her conclusions on an error of law and without knowledge of A as an individual. Neither 'expert' referred to the adoption checklist in their reports nor completed a *Re B-S* assessment. Bodey J failed to see these inadequacies and preferred their views over those of adoption social worker who had been working with the family for almost two years because of their independence and greater experience (para 59). Even McFarlane LJ rejected counsel's argument because of Bodey J's experience. Such errors occur because individuals assume they know the right answers to complex problems or apply heuristics to find an answer quickly. An increase in cases places pressure on professionals and courts so they behave in this 'sloppy' way. The solution lies not in lists of guidance but interdisciplinary knowledge and professional challenge, and in reducing applications, for example by refusing leave.

It is not surprising that Jackson LJ hoped the dispute could be resolved by agreement (Jackson, 2009). However, civil cases are vastly different; a money claim would not have challenged King Solomon's wisdom. Neither couple had any choice but to use the courts to obtain a legal relationship with A. The court had foisted this dispute on the Xs, but not given them the power to resolve it. Withdrawing their application would not safeguard A's welfare. Post adoption contact relationships are complex and difficult to sustain (Neil *et al* 2014), litigation over full time care is an unlikely basis for success. In a context where judges have questioned whether parents can ever truly consent to their children being looked after (CA 1989, s.20), judges must be careful not to pressurise parties rather than make decisions.

Family cases resolve (or not) individual claims, they also indicate the current climate in family justice. *Re W* demonstrates that the stormy period heralded by *Re B*, has not yet resolved into clear skies. The lightning flashes from the Supreme Court have obscured the value of adoption and fog and hailstones from the Court of Appeal have made it hard to find the way. The adults and children exposed to these storms have suffered most.

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